

CRIM. NO.

2 2 3 4 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOMENIC N. MASTRIIPPOLITO,
CLINTON B. HOWARD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

FEB 20 1968

WM B LUCK CLERK

APPELLANTS' OPENING BRIEF

JOHN J. BRADLEY
Attorney at Law
215 West Fifth Street
Los Angeles, California
MAdison 9-2261

Attorney for Appellants.

TOPICAL INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page

JURISDICTIONAL FACTS	1
STATEMENT OF FACTS	2
ARGUMENT	2
CERTIFICATION OF COUNSEL	5
AFFIDAVIT OF SERVICE BY MAIL	6,7

AUTHORITIES

Page

CASES

Murphy v. Waterfront Commission of New York, 378 U.S. 52, 12 L. ed. 2d 678, 84 S.Ct. 1594	3
Ullman v. United States, 350 U.S. 422, 426, 100 L. ed. 511, 518, 76 S. Ct. 487	3

CODES and CONSTITUTIONS

Sections 4411 and 4412, Title 26 U.S.C.	1,2,3,4
Section 7201, Title 26 U.S.C.	1
Fourth Amendment to the Constitution of the United States, Title 26	2
Fifth Amendment to the Constitution of the United States	4

1 CRIM. NO.

2 2 2 3 4 9

3
4 IN THE UNITED STATES COURT OF APPEALS

5 FOR THE NINTH CIRCUIT

6
7 DOMENIC N. MASTRIIPPOLITO,
8 CLINTON B. HOWARD,

9 Appellants,

10 vs.

11 UNITED STATES OF AMERICA,

12 Appellee.

13
14
15 APPELLANTS' OPENING BRIEF

16
17
18
19
20 JOHN J. BRADLEY
21 Attorney at Law
22 215 West Fifth Street
23 Los Angeles, California
24 MADison 9-2261

25 Attorney for Appellants.
26

1 CRIM. NO.

2 2 2 3 4 9

3
4 IN THE UNITED STATES COURT OF APPEALS

5 FOR THE NINTH CIRCUIT

6
7
8 DOMENIC N. MASTRIIPPOLITO,
9 CLINTON B. HOWARD,

10 Appellants,

11 vs.

12 UNITED STATES OF AMERICA,

13 Appellee.

14
15 _____
16 APPELLANTS' OPENING BRIEF
17 _____

18
19 JURISDICTIONAL FACTS

20 This is a joint appeal by the two named appellants
21 who were indicted on October 12, 1966, in a two count indict-
22 ment by the Federal Grand Jury in the Central District of
23 California. Each count charged violation of Section 4411
24 and 4412, Title 26 U.S.C. and wilful evasion of said tax in
25 violation of Section 7201, Title 26 U.S.C. Each appellant
26 was charged as a principal in one count and as an aider and

1 abettor in the other count.

2 On January 30, 1966, both appellants were found
3 guilty by the Court, having waived jury trial, and were sen-
4 tenced to one year on each count, said sentences to run
5 concurrently.

6 On February 9, 1967, this sentence of appellant
7 HOWARD was modified to a fine of \$300.00, which was paid on
8 March 1, 1967.

9 Appellant MASTRIPPOLITO filed notice of appeal on
10 January 30, 1967, the day sentence was pronounced, and
11 appellant HOWARD filed notice of appeal on February 6, 1967.

12 13 STATEMENT OF FACTS

14 The appellants herein entered into a stipulation by
15 counsel that the evidence was sufficient to establish a
16 violation of Sections 4411 and 4412 of Title 26, United
17 States Code and that the pleadings were in proper form.

18 19 ARGUMENT

20 It is the contention of both appellants that Sections
21 4411 and 4412 of Title 26, United States Code violates the
22 Fourth Amendment to the Constitution of the United States in
23 as much as said provisions of Title 26 makes it mandatory
24 that persons engaged in accepting wagers on horseracing or
25 sporting events incriminate themselves under the law of the
26 State in which they reside.

1 On June 15, 1964, the Supreme Court of the United
2 States in Murphy v. Waterfront Commission of New York, 378
3 U.S. 52, 12 L. ed. 2d 678, 84 S. Ct. 1594, held that the
4 Constitutional privilege against self incrimination protects
5 a state witness against incrimination in a Federal Court
6 where a state has granted a witness immunity against state
7 prosecution.

8 In the case at bar there was no immunity granted
9 to appellants who were required to buy the tax stamp under
10 the provisions of Sections 4411 and 4412 of Title 26, U.S.C.

11 However, the question raised by appellants herein
12 does not turn upon the question of whether there was a grant
13 of immunity by either the state or Federal jurisdiction.
14 The Murphy case is significant in that it establishes that
15 the privilege against self incrimination "registers an
16 important advance in the development of our liberty - one
17 of the great landmarks in man's struggle to make himself civi-
18 lized." Ullman v. United States, 350 U.S. 422, 426,
19 100 L. ed. 511, 518, 76 S. Ct. 487.

20 The ultimate question raised by appellants is whether
21 the Federal Government can eliminate the privilege against
22 self-incrimination in a state jurisdiction by the guise of
23 a tax statute that has no realistic relationship to taxable
24 activities except to protect a monopoly created in favor
25 of race track operators in the states in this country.

26 It must be recognized that accepting wagers on horse

1 races and sporting events is not a violation of any Federal
2 law. The race tracks in our various states do this openly
3 and with state sanction about every day of each year.

4 In almost every state the Legislature has seen fit
5 to protect a monopoly it has created by making it a felony
6 for anyone not operating a licensed race track to accept a
7 wager on a horse race.

8 The critical issue in this case is whether the
9 Federal Government, without granting immunity from state pro-
10 secution, can compel citizens of the states to furnish
11 information which would incriminate them under state law as
12 a condition to being engaged in competition with other citi-
13 zens in their own state who derive their livelihood from the
14 same business.

15 In other words does the Fifth Amendment to the Con-
16 stitution of the United States apply to legislative action
17 as well as judicial or executive action.

18 It is submitted that Sections 4411 and 4412 of Title
19 26 U.S.C. are unconstitutional and the convictions of
20 appellants should be reversed.

21
22 Respectfully submitted

23
24

JOHN J. Bradley,
Attorney for Appellants.
25
26



CERTIFICATION OF COUNSEL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: January 12, 1968.

JOHN J. BRADLEY,
Attorney for Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

MARIE LUETCKE, being first duly sworn, deposes and says:

That I am and was at all times herein mentioned a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding.

That my business address is Suite 419, 215 West Fifth Street, Los Angeles, California 90013.

That on January 12, 1968, I served the within Appellants' Opening Brief on the Appellee in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid, in a mailbox located in the Lobby at 215 West Fifth Street, Los Angeles, California, addressed to the attorneys for the said Appellee at the office address of said attorneys as follows:

WILLIAM MATTHEW BYRNE, JR.
United States Attorney

GERALD F. UELMEN
Assistant United States Attorney

600 U. S. Courthouse

312 North Spring Street

Los Angeles, California 90012

1 Dated: January 12, 1968.

2
3 Marie Luetcke

4
5 Subscribed and sworn to
6 before me this 12th day of
7 January, 1968.

8 Lillian Ashley, Notary Public
9 in and for the County of Los
10 Angeles, State of California

11 My Commission Expires: September 3, 1970.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

